



**CITY OF LODI
COUNCIL COMMUNICATION**

TM

AGENDA TITLE: Authorize City Manager to Execute Revised Lease of 111 North Stockton Street, Suite B, (formerly Jazzercise) to P & K Fitness of Lodi

MEETING DATE: March 2, 2011

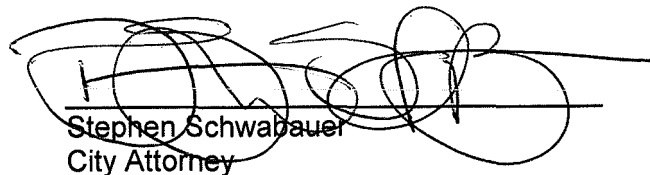
PREPARED BY: City Attorney's Office

RECOMMENDED ACTION: Authorized City Manager to execute revised lease of 111 North Stockton Street, Suite B, (formerly Jazzercise) to P & K Fitness of Lodi.

BACKGROUND INFORMATION: Council previously approved a lease with P & K Fitness of Lodi for the operation of a Cross Fit fitness gym in the former Jazzercise facility. The initial lease required P & K Fitness to perform several tenant improvements including: bringing the existing bathroom to current ADA standards, adding a second bathroom, bringing the interior of the facility to current ADA standards and adding two showers and a new hot water heater. After looking closer at the facility, P & K realized it would have to replace the entire sewer line to support the addition of showers and that the remaining improvements would cost significantly more than their original estimate. Because the lease price was based on the prior estimate, and because the shower and hot water heater costs were prohibitive, P & K requests that the lease be amended to strike those tenant improvement requirements.

FISCAL IMPACT: Not applicable.

FUNDING AVAILABLE: Not applicable.


Stephen Schwabauer
City Attorney

APPROVED:


Konrad Bartlam, City Manager

RENTAL AGREEMENT
111 N Stockton Street, Suite B
Lodi, California

THIS AGREEMENT, made and entered into this 17th day of March, 2011 by and between the CITY OF LODI, a municipal corporation, (hereinafter "Owner"), and P & K Fitness of Lodi, a California Limited Liability Company hereinafter ("Tenant").

WITNESSETH:

1. **PROPERTY:** That for and in consideration of the rents to be paid, and the covenants to be faithfully kept and performed by Tenant, Tenant does hereby rent from Owner, the premises located at 111 N. Stockton Street, Suite B, Lodi, California and all improvements thereto (the "Property") for the operation of P & K Fitness of Lodi.
2. **TERM:** The term of this Agreement begins on March 17, 2011 ("Commencement Date") and shall continue until March 17, 2014. Tenant shall have two options to renew this agreement for consecutive two year terms on the terms set forth in this agreement and at the rates set forth in paragraph 3 of this agreement. Both options must be exercised in writing by tenant at least 90 days before the expiration of the then current term.
3. **RENT:** In consideration of this Agreement, Tenant agrees to pay to Owner as rent for the Property the sum amounts set forth below, due and payable by the 1st day of each month, commencing on March 17, 2011. A late charge of \$60 may be assessed for any payment more than 10 days past due. Rental payments shall be directed to the City of Lodi, Attn: Parks & Recreation Department, 125 N. Stockton Street, Lodi, California, 95240, for processing and shall be paid without prior notice or demand to Tenant. Tenant acknowledges that the rent is prorated in acknowledgement of tenant supplied tenant improvements to the property set forth in Paragraph 29. Lease payments shall be waived until the completion of the tenant improvements called for in this Agreement. Lease payments shall be prorated for any partial month after the issuance of the final building permit.

Months 0-24: \$1825.00/month

Months 24-36: \$3650.00/month

Months 36-60: \$4015.00/month (First Option Period)

Months 60-84: \$4380.00/month (Second Option Period)

4. **USE/USE PROHIBITED:** The property shall be used solely for the purpose of carrying on the business of P & K Fitness of Lodi. Tenant shall not use any portion of the Property for purposes other than those specified herein, and no use shall be made or permitted to be made upon the Property, nor acts done, which will increase the existing rate of insurance upon the Property, or cause cancellation of insurance policies covering the Property. Tenant shall not engage in any activities excluded from coverage under its insurance policy on the Property. Tenant shall not conduct or permit any sale by auction on the Property.
5. **ORDINANCES AND STATUTES:** It is further understood and agreed by Tenant that Tenant must comply with all present and future laws, ordinances, rules, and regulations promulgated by any governmental authority of competent jurisdiction regulating the type

of business to be conducted on the Property during the term of this Agreement and any extension thereof. Tenant shall use and occupy the Property in a quiet, lawful, and orderly manner. The commencement of pendency of any state or federal court abatement proceeding affecting the use of the Property shall, at the option of the Owner, be deemed a breach hereof.

6. **SIGNS:** Owner reserves the exclusive right to the roof, side and rear walls of the Property. Tenant shall not construct any projecting sign or awning without prior written consent of Owner which consent shall not be unreasonably withheld. It is agreed that Tenant will post "Hours of Operation" signs on the doors of the Property. All signs and locations of signs must be approved by the City of Lodi Parks & Recreation Director. All costs associated with the purchase and installation of signs shall be the responsibility of Tenant.
7. **ABANDONMENT OF PROPERTY:** Tenant shall not vacate or abandon the Property at any time during the term hereof, and if Tenant shall abandon or vacate the Property, or be dispossessed by process of law, or otherwise, any personal property belonging to Tenant left upon the Property shall be deemed to be abandoned, at the option of Owner.
8. **TRADE FIXTURES:** Any and all improvements made to the Property during the term hereof shall belong to the Owner, except trade fixtures of the Tenant. Tenant may, upon termination hereof, remove all trade fixtures, but shall repair or pay Owner for all repairs caused by damage to the Property occasioned by the removal of such trade fixtures.
9. **DESTRUCTION OF THE PROPERTY:** in the event of a partial destruction of the Property during the term hereof, from any cause, Owner shall forthwith repair the same, provided that such repairs can be made within sixty (60) days under existing governmental laws and regulations, but such partial destruction shall not terminate this Agreement, except that Tenant shall be entitled to a proportionate reduction of rent while such repairs are being made, based upon the extent to which the making of such repairs shall interfere with the business of Tenant on the Property. If such repairs cannot be made within sixty (60) days, Owner, at his option, may make the same within a reasonable time, this Agreement continuing in effect with the rent proportionately abated as aforesaid, and in the event that Owner shall not elect to make such repairs which cannot be made within sixty (60) days, this Agreement may be terminated at the option of either party.

In the event that the building in which the Property may be situated is destroyed to an extent of not less than one-third of the replacement costs thereof, Owner may elect to terminate this Agreement whether the Property be injured or not. A total destruction of the building in which the Property may be situated shall terminate this Rental Agreement.

In the event of any dispute between Owner and Tenant with respect to the provisions hereof, the matter shall be settled by arbitration in such a manner as the parties may agree upon, or if they cannot agree, in accordance with the rules of the American Arbitration Association.

10. **INSOLVENCY:** In the event a receiver is appointed to take over the business of Tenant, or in the event Tenant makes a general assignment for the benefit of creditors, or Tenant takes or suffers any action under any insolvency or bankruptcy act, the same shall constitute breach of this Agreement by Tenant.

11. **REMEDIES OF OWNER ON DEFAULT:** In the event of any breach of this Agreement by Tenant, Owner may, at its option, terminate this Agreement and recover from Tenant: (a) the worth at the time of award of the unpaid rent which was earned at the time of termination; (b) the worth at the time of award of the amount by which the unpaid rent which would have been earned after termination until the time of the award exceeds the amount of such rental loss that the Tenant proves could have been reasonably avoided; (c) the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of such rental loss that Tenant proves could be reasonably avoided; and (d) any other amount necessary to compensate Owner for all detriment proximately caused by Tenant's failure to perform its obligations under this Agreement or which in the ordinary course of things would be likely to result therefrom.

Owner may, in the alternative, continue this Agreement in effect, as long as Owner does not terminate Tenant's right to possession, and Owner may enforce all his rights and remedies under this Agreement, including the right to recover the rent as it becomes due under this Agreement. If such breach continues, Owner may, at any time thereafter, elect to terminate this Agreement.

Nothing contained herein shall be deemed to limit any other rights or remedies which Owner may have.

12. **RELATIONSHIP OF PARTIES:** It is understood and agreed that the relationship between the parties is that of landlord and tenant and not as a party or agent of Owner. Tenant, shall carry Worker's Compensation Insurance and observe all laws and regulations applicable to employers in the State of California.
13. **BUILDING MAINTENANCE:** Building Maintenance (Janitorial Services) shall be the responsibility of Tenant.
14. **ASSIGNMENT AND SUBLETTING:** Tenant shall not assign this Agreement or sublet any portion of the Property without prior written consent of the Owner, which shall not be unreasonably withheld. Any such assignment or subletting without consent shall be void and, at the option of the Owner, may terminate this Agreement.
15. **ENTRY AND INSPECTION:** Tenant shall permit Owner or Owner's agents to enter upon the Property at reasonable times and upon reasonable notice, for the purpose of inspecting the same.
16. **MAINTENANCE, REPAIRS, ALTERATIONS OR ADDITIONS:** Tenant acknowledges that the Property is in good order and repair, unless otherwise indicated herein. Tenant shall, at his own expense and at all times, maintain the Property in good and safe condition, including plate glass, and shall surrender the same, at termination hereof, in as good condition as received, normal wear and tear excepted. Tenant shall be responsible for all repairs required, excepting the roof, exterior walls, structural foundations, and common areas which shall be maintained by Owner. No repairs, alterations or additions to the Property shall be made without prior written consent of Owner. Prior to the commencement of any substantial repair, improvement, or alteration, Tenant shall give Owner at least two (2) days written notice in order that Owner may post appropriate notices to avoid any liability for liens. Tenant shall not commit any waste upon the Property, or any nuisance or act which may disturb the quiet enjoyment of any tenant of

Owner. Any concerns shall be submitted in writing to the Parks & Recreation Director, City of Lodi, P. O. Box 3006, Lodi, CA 95241.

17. **SURRENDER OF PREMISES:** Tenant shall, at the termination of the Agreement hereby created, or upon the earlier termination hereof for any reason, or upon the extension of the term herein set forth, quit and surrender the Property in good order, condition, and repair, reasonable wear and tear and acts of God or fire excepted.
18. **FEES:** Tenant shall pay all license fees, or other fees or taxes, including possessory interest taxes, levied by any governmental agency which may be imposed upon the business of Tenant or its subtenant conducted upon the Property.

If any of the above charges are assessed against the Property, and because of said assessment, the Owner pays the same, the Owner will have the right to, regardless of the validity of any such levy, demand that Tenant repay to Owner all taxes and other assessments so levied against Owner.

19. **UTILITIES:** Owner agrees that it shall be responsible for the payment of all utilities, including water, wastewater, gas, and electricity. However, Tenant shall reimburse Owner's gas and electricity costs that exceed \$200.00 per month within 30 days of receiving an invoice from the City of Lodi. During the term of this Agreement, and any extension thereof, it is understood and agreed by the parties hereto that Tenant shall be responsible for the installation, maintenance and cost of any telephone lines that are required to operate its business, and solid waste removal, at no cost to Owner.
20. **MECHANIC'S LIEN:** Tenant agrees to keep the Property free from all liens and claims of mechanics, laborers, material suppliers, and others for work done, and material furnished, and Tenant shall not create, or suffer to be created, any lien or encumbrance on the Property.
21. **PUBLIC LIABILITY AND PROPERTY DAMAGE INSURANCE:** Tenant, at its expense, shall maintain plate glass and public liability insurance including bodily injury and property damage insuring Tenant and Owner with minimum coverage of \$3,000,000 each occurrence. More particularly described as follows:

Tenant agrees to indemnify, defend and save harmless Owner from and against all claims of whatever nature arising from any act, omission, or negligence of Tenant or Tenant's contractors, licensees, agents, servants, or employees, or arising from any accident, injury, or damage whatsoever caused any person, or to the Property of any person, occurring during the term thereof, in or about the Property where such accident, damage, or injury, including death, results, or is claimed to have resulted, from any act or omission on the part of Tenant or Tenant's agents or employees. This indemnity and hold harmless agreement shall include indemnity against all costs and expenses, including attorney's fees incurred in or in connection with any such claim or proceeding brought thereon and the defense thereof.

Tenant agrees to maintain in full force during the term hereof a policy of public liability insurance under which Tenant is named as insured, and containing an additional named insured endorsement naming Owner as an additional insured, and under which the insurer agrees to indemnify and hold Tenant and Owner harmless from and against all costs, expenses, and liability arising out of, or based upon, any and all property damage, or damages for personal injuries, including death, sustained in accidents occurring in or

about the Property, where such accident, damage, or injury, including death, results, or is claimed to have resulted, from any act or omission on the part of Tenant, or Tenant's agents or employees. The minimum limits of such insurance shall be \$1,000,000.00 (One Million Dollars). In addition to the additional named insured endorsement on Owner's policy of insurance, said insurance policy shall be endorsed to include the following language:

"Insurance as is afforded by the endorsement for additional insureds shall apply as primary insurance. Any other insurance maintained by the City of Lodi or its officers and employees shall be excess only and not contributing with the coinsurance afforded by this endorsement."

To the maximum extent permitted by insurance policies which may be owned by Owner or Tenant, Owner and Tenant, for the benefit of each other, waive any and all rights of subrogation which might otherwise exist.

A duplicate or certificate of said public liability and property damage insurance policy containing the above-stated required endorsements shall be delivered to Owner within ten (10) days after the issuance and each renewal of said policy. This paragraph, and all other provisions of this Agreement, shall apply and be construed as applying to any subtenant of Tenant.

22. **BANKRUPTCY, RECEIVERSHIP, AND INSOLVENCY:** If Tenant should make a general assignment for the benefit of creditors, or file a voluntary petition in bankruptcy, or be adjudicated bankrupt or insolvent, or permit a receiver to be appointed to take possession of a substantial portion of its assets or of the premises, and such bankruptcy, insolvency, or receivership proceeding shall not be dismissed within ninety (90) days, then Owner may, without notice or demand, terminate this Agreement and forthwith reenter and repossess the Property, and remove all persons therefrom, and under no circumstances shall this Agreement be assignable or transferable by operation of law.
23. **ATTORNEY'S FEES:** In case suit should be brought for recovery of the Property, or for any sum due hereunder, or because of any act which may arise out of the possession of the Property, by either party, the prevailing party shall be entitled to all costs incurred in connection with such action, including a reasonable attorney's fee, the amount of which shall be determined by the court in such suit and added to and become a part of the judgment therein.
24. **WAIVER:** Failure of Owner to insist upon performance of any of the terms or conditions of this Agreement in any one or more instances shall in no event be construed as a waiver or a relinquishment of its right to future performance thereof, and Tenant's obligations to such future performance shall continue in full force and effect. The receipt by Owner of rent, with the knowledge of the breach of this Agreement or condition hereof, shall not be determined to be a waiver of any such breach.
25. **NOTICES:** Any notice which either party may or is required to give, shall be given by mailing the same, postage prepaid, to Tenant at the premises, or Owner at the address shown below, or at such other places as may be designated by the parties from time to time as provided herein.

OWNER:

TENANT:

Parks & Recreation Director
City of Lodi
P. O. Box 3006
Lodi, California 95241

P & K Fitness of Lodi LLC
5252 Bear Creek Road
Lodi, California 95240

26. **HOLDING OVER:** If applicable under this Agreement, any holding over after the expiration of this Agreement, with the consent of Owner, shall be construed as a month-to-month tenancy at a rental of 110% of the most recent rental rate per month, otherwise in accordance with the terms hereof, as applicable.
27. **TIME:** Time is of the essence of this Rental Agreement.
28. **HEIR, ASSIGNS, SUCCESSORS:** This Rental Agreement is binding upon and inures to the benefit of the heirs, assigns and successors in interest to the parties.
29. **TENANT IMPROVEMENTS:**
- a. **Tenant Improvements.** Tenant Improvements for Building shall be provided for and funded by The Tenant. Construction of Tenant Improvements shall commence upon issuance of a building permit by CITY. Title to all tenant improvements listed in this paragraph shall immediately vest in Owner. Tenant Improvements shall be constructed in similar form and content to The Plan attached to this Lease as and shall include, but not be limited to, the following components:
 - i. Addition of a second bathroom and renovation of existing bathroom to meet current building code requirements, including but not limited to ADA compliance.
 - ii. Tenant shall install interior improvements to bring the facility up to all current ADA accessibility standards.
 - b. **Construction Timeline.** The parties anticipate that Tenant Improvements will be completed within three (3) months of the execution of this Lease, but in no event shall such improvements be completed later than April 30, 2011. Failure to complete construction of Tenant Improvements as set forth above shall be deemed a material breach of this Lease.
 - c. **Title to Improvements:** Immediately upon completion of the Improvements Title thereto shall vest in City. All improvements shall be left in place upon the termination of this Agreement.
30. **OWNER'S LIABILITY:** The term "Owner" as used in this paragraph, shall mean only the owner of the real property. In the event of any transfer of such title or interest, the Owner named herein (or the grantor in case of any subsequent transfers) shall be relieved of all liability related to Owner's obligations to be performed after such transfer. Provided, however, that any funds in the hands of Owner or Grantor at the time of such transfer shall be delivered to Grantee. Owner's aforesaid obligations shall be binding upon Owner's successors and assigns only during their respective periods of ownership.

31. ACCEPTANCE OF THE PROPERTY: Tenant has examined the Property knows the conditions thereof, and accepts possession thereof in its present condition.
32. CONTRACT: This written agreement constitutes the entire agreement between the Tenant and Owner, and no representation or agreement, whether oral or written, unless expressed herein, shall be binding on either Tenant or Owner.

IN WITNESS WHEREOF, Owner and Tenant have executed this Agreement on the date and year first above written.

“OWNER”

CITY OF LODI, a municipal corporation

“TENANT

P & K Fitness of Lodi LLC

Konradt Bartlam
City Manager

By _____

ATTEST:

Randi Johl
City Clerk

Dated: _____

APPROVED AS TO FORM:

D. Stephen Schwabauer
City Attorney

